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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re J.B., a Person Coming Under the  
Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES  
AGENCY,

Plaintiff and Respondent,

v.

M.G. et al.,

Defendants and Appellants.

G046957

(Super. Ct. No. DP020460)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County,  
Jane Shade, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Brent Riggs, under appointment by the Court of Appeal, for Defendant and  
Appellant M.G.

Megan Turkat Schirn, under appointment by the Court of Appeal, for  
Defendant and Appellant John B.

Nicholas S. Chrisos, County Counsel, and Karen L. Christensen and  
Jeannie Su, Deputy County Counsel, for Plaintiff and Respondent.

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In this third dependency proceeding for J.B. (now age seven), M.G. (mother) and John B. (father) appeal from the termination of their parental rights. Parents contend the court's termination of father's parental rights was detrimental to J.B. under the statutory exception to adoption for a beneficial parental relationship. (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(i).)<sup>1</sup> They also argue the court erred at the section 366.26 hearing by (1) denying father's request that the court select temporary guardianship as J.B.'s permanent plan, and (2) terminating parental rights without sufficient evidence of J.B.'s wishes. We affirm.

## FACTS

In 2005, in Los Angeles County, then newborn J.B. experienced his first dependency proceeding, after suffering from drug withdrawal symptoms at birth, including a positive toxicology screen for amphetamine, methamphetamine, and tetrahydrocannabinol. At the time, mother had a seven-year history of drug abuse and had used drugs during the pregnancy. Father had failed to protect J.B. even though father knew about mother's illicit drug use. Father himself had a 10-year history of substance

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All statutory references are to the Welfare and Institutions Code.

The court ruled the beneficial parental relationship exception did not apply as to either parent. On appeal, parents challenge the ruling only as to *father*. Accordingly, our factual recitation focuses on father's visitation, contact, and relationship with J.B.

abuse. The parents received over one year of family reunification services and completed substance abuse programs and testing, parent education, and counseling. They then received six months of family maintenance services. After 18 months of services, J.B. was returned to their care and the case was closed in December 2006.

One year and three months later, in March 2008, in Los Angeles County, then two-year-old J.B. was detained and placed in protective custody after police found the toddler on the driveway outside the family home with no adult supervision. Officers knocked at the front door for 20 minutes before father finally responded and said he had been asleep. The parents admitted this was the second time J.B. had left the home while they were asleep and that they had relapsed on drugs and alcohol. J.B. was placed in the home of his maternal grandfather, an Australian billionaire. When maternal grandfather moved to another country, he asked that J.B. be placed with L.R. (J.B.'s godmother). L.R. had been maternal grandfather's personal assistant for 10 years and is a former elementary school teacher. Maternal grandfather provided financial support for J.B. Meanwhile, the parents received six months of family reunification services and six months of family maintenance services. In March 2010, the court terminated jurisdiction over J.B.

Seven months later, in October 2010, the Orange County Social Services Agency (SSA) initiated the current dependency proceeding by filing a petition alleging J.B. came within section 300, subdivision (b) (failure to protect). In an amended petition, SSA alleged, inter alia (1) around October 1, 2010, mother was arrested for possession of methamphetamine and a pipe, (2) mother's substance abuse problem was unresolved despite her completion of treatment programs, (3) around October 20, 2010, SSA and the police found the family home to be unclean and unsanitary, with blood splattered and pooled inside and outside the residence, and with "You're Done Son" written on the kitchen floor by father in his own blood, (4) around October 20, 2010, father was arrested, (5) father's substance abuse problem was unresolved despite his completion of

treatment programs, (6) mother and father had engaged in domestic violence in J.B.'s presence, (7) J.B. had been a previous dependent on two occasions, and mother and father had received family reunification and family maintenance services which had proven to be ineffective in resolving the family's need for further juvenile court intervention, and (8) about two weeks prior to October 20, 2010, father had made arrangements for J.B. to stay with L.R.

SSA's report revealed the following details concerning the petition's allegations. Mother and father are not married, but live together in a home maternal grandfather bought for mother. On October 1, 2010, with J.B. in the car and father standing in front of a 7-11 store, mother was arrested for possessing methamphetamine and Xanax, after she agreed to a search of the car and tried to throw the drugs in a trash can. J.B. was released to father. Father gave the officers a false name.<sup>2</sup>

On October 20, 2010, social workers made an unannounced visit to the family residence at a condominium complex. They phoned for police assistance since they had been advised by father's social worker that father should be considered violent and dangerous. Hearing a loud scream, the social workers and police officers looked through a fence and saw blood spots outside the home and father covered in blood from head to toe. Officers called to father to open the gate so they could help him. Father yelled that his nose, hand and elbow were broken, but that if he let the officers inside the property, they would arrest him. About 20 minutes later, father let the officers inside the gate. Eventually he stated he had been in a fight. When officers asked where the child was, father first said, "My son . . . he's upstairs and he was crying and screaming." Officers searched the home and found no one else there. Father then said, "My son is in protective custody. I don't know where, I just know he's in protective custody." When

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There was evidence father was arrested at that time for giving a false name.

asked a third time, father replied, “What kid? I don’t have any kids. I don’t have a son.” Father was arrested on an outstanding warrant.

The court placed J.B. with L.R. At that time, J.B. told SSA that the most important person in his life is father, but he was “having a good time” in L.R.’s home.

At an October 25, 2010 hearing, father’s counsel advised the court that father did not want visits with J.B. while father was in custody, but did request telephone contact. The court granted monitored visitation of up to three times per week and up to two hours per visit for each parent, and monitored phone calls three times per week of up to 10 minutes per phone call. The court also issued a temporary order restraining father from harassing or contacting mother and requiring father to immediately move out of mother’s home.

In November 2010, SSA spoke with J.B. at his school. J.B. seemed healthy, happy, and friendly. He said he was staying with “my [L.R.]” and had been “removed from his parents because they ‘fight all the time.’” The child said, “I saw them punch each other in the face. I don’t want to visit my mother or father until they think about what they did.” For as long as the child could remember, his parents had been fighting.

From mid-November 2010 through early January 2011, father resided at a drug treatment facility, which permitted visitation with J.B. In early January 2011, father moved to an extended living facility. In January 2011, father reported a disruption in his visits with J.B. due to L.R.’s mother supervising the visits. When L.R. returned from vacation, she advised SSA that during a visit supervised by her mother, father had taken J.B. to a 7-11 store. As a result, SSA changed father’s venue to an SSA facility monitored by SSA.

In January 2011, at the jurisdiction hearing, the court found true the allegations of the amended petition.

In early February and early March of 2011, father's monitored visits with J.B. went well, although father had to be cautioned to stop telling J.B. that the child would be reunifying with father.

On March 14, 2011, father's counsel informed the court that father was in custody to serve a 10-day sentence.

In April and May 2011, father missed four visits with J.B. and two drug tests. Father told L.R. that he was "messing up."

In May 2011, father was arrested for receiving a stolen vehicle. He pleaded guilty to buying or receiving a stolen vehicle or equipment and was sentenced to 68 days in jail and three years of formal probation. Father later testified that he landed in jail because he relapsed by drinking a beer.

In July 2011, father moved into a sober living facility. Then father entered the Salvation Army drug treatment program, which disallowed him contact with anyone for 30 days.

In early October 2011, father phoned and spoke with J.B. for a short time.

In November 2011, at the disposition hearing, the court declared J.B. a dependent of the court. The court found the parents were not entitled to reunification services. (§ 361.5, subd. (b)(13).)<sup>3</sup> The court scheduled a section 366.26 hearing for March 20, 2012.

On Thanksgiving, father phoned J.B. In early December, father sent J.B. a letter and phoned the child.

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Section 361.5, subdivision (b)(13) provides that reunification services need not be provided to a parent when the court finds: "That the parent . . . has a history of extensive, abusive, and chronic use of drugs or alcohol and has resisted prior court-ordered treatment for this problem during a three-year period immediately prior to the filing of the petition that brought that child to the court's attention, or has failed or refused to comply with a program of drug or alcohol treatment described in the case plan required by Section 358.1 on at least two prior occasions, even though the programs identified were available and accessible."

In SSA's February 2012 report for the section 366.26 hearing, SSA noted J.B. said he wishes to remain with L.R. The child refers to L.R. as his mom. J.B. said he wants to live in his current home "forever." L.R. wished to adopt J.B. and was in the process of completing her home study. She appeared to love the child dearly. J.B. was an "adorable six year old who is full of personality," the type of child sought after by prospective adoptive parents. L.R. planned to allow the parents supervised visitation after adopting J.B., if the parents proved their sobriety for a period of time. L.R. planned to permanently maintain the child's relation with his maternal grandfather and maternal aunts.

SSA reported that the parents had failed to maintain consistent visitation with J.B. Father had last visited the child in April 2011. Despite being allowed up to three visits per week with J.B., father had not taken advantage of the opportunity because he was working on his recovery program and did not want to disappoint J.B. by being inconsistent. Father had graduated from the Salvation Army program in January 2012 and was residing in a sober living home. "Recently," father had phoned J.B. every Sunday and planned to continue doing so.

In March 2012, father filed a section 388 petition, asking the court to vacate the section 366.26 hearing, reinstate his reunification services, and set a date to review the case plan. Father declared, inter alia, that he was working the 12 steps and focusing on his sobriety. He declared J.B. had in the past loved their visits and continued to enjoy their "regular contact despite the fact that it is more limited." The court denied the petition.

In April 2012, father told SSA he wished to resume visitation with J.B., but then changed his mind after speaking to his AA sponsor and other people. Father was "focusing on 'making [his] life better'" and explained this to J.B. He had told J.B. he (father) did not know when they could see each other again: "It could be a year, but we

don't know.” In May 2012, SSA reported that, for the past three to four months, father had phoned J.B. once a week and the calls had gone well.

At the May 2012 section 366.26 hearing, the court found that J.B. was likely to be adopted and that the beneficial relationship exception did not apply. The court ordered the termination of parental rights and that J.B. be placed for adoption.

## DISCUSSION

### *Substantial Evidence Supports the Court's Finding the Beneficial Relationship Exception Did Not Apply*

Parents contend father satisfied all requirements of the beneficial relationship exception, including regular visitation and contact. They argue insufficient evidence supports the court's finding to the contrary.

Under section 366.26, subdivision (c)(1), if the court determines the child is likely to be adopted, the court must terminate parental rights and order the child placed for adoption unless one of six exceptions applies. The party claiming the exception bears the burden of producing sufficient supporting evidence. (*In re Megan S.* (2002) 104 Cal.App.4th 247, 252.)

One of these six exceptions is the beneficial relationship exception established under subdivision (c)(1)(B)(i) of section 366.26. That subdivision states the court need not terminate the parental rights of a parent who has “maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” The parent seeking to retain his or her parental rights must establish that both prongs of the exception have been met. As to the first prong, the parent must show he or she has “maintained regular visitation and contact . . . .” (*Ibid.*) As to the second prong, the parent must establish that “the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent

home with new, adoptive parents.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575 (*Autumn H.*).)

On review, applying the substantial evidence test, we “accept the evidence most favorable to the order as true and discard the unfavorable evidence . . . .” (*In re Casey D.* (1999) 70 Cal.App.4th 38, 53.) We give “the prevailing party the benefit of every reasonable inference and [resolve] all conflicts in support of the order.” (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.)

Here, the court found “that neither prong” of the beneficial exception had been met. As to the regular visitation and contact prong, the court noted “that parents’ visits have been very sporadic, although father’s been calling regularly as of late.”

The regular visitation and contact element of the beneficial relationship exception “is somewhat self-explanatory.” (Seiser & Kumli, Cal. Juvenile Courts Practice and Procedure (2012) Permanency Planning Procedures, § 2.171[5][b][i][A], p. 2-485.) It does not require the parent to have “‘maintained day-to-day contact.’” (*In re C.B.* (2010) 190 Cal.App.4th 102, 124 (*C.B.*).) But it does require the parent to have “‘maintained *regular* visitation and contact with the child . . . .” (§ 366.26, subd. (c)(1)(B)(i), *italics added.*) In other words, the parent must have visited *and* contacted the child as a “steady . . . practice or occurrence” recurring at “uniform intervals.” (Webster’s 3d. New Internat. Dict. (2002) p. 1913.) Stated another way, the visitation and contact must be consistent. (Webster’s 3d. New Internat. Dict. (2002) p. 484 [“consistent” defined as “marked by . . . regularity, or steady continuity throughout”].)

Indeed, sporadic visits and contact can harm a child more than none at all. In March 2011, J.B. told SSA that he missed and wanted to see mother and did not understand why she did not phone him. But then, during the three months when mother did visit J.B., the child started disobeying his teacher in the classroom and hitting other children on the playground. These were unusual behaviors for J.B. which subsided only after he received therapy. When SSA asked J.B. about his bad behavior at school, the

child said it was “because of [his] mom and dad” and that it “hurts” him that they are not better.

Substantial evidence supports the court’s finding father failed to establish he maintained regular visitation and contact with J.B. During the current dependency, father was incarcerated several times (for periods including Oct. 10, 2010 and possibly Oct. 1, 2010, and for 68 days commencing in May 2011, and 10 days including Mar. 10, 2011). The current dependency lasted 17 months — from October 2010 to May 2012. During those 17 months, father visited J.B. regularly only during the four or five months from mid-November 2010 to early March or April of 2011. Indeed, at the time of the section 366.26 hearing, J.B. had not seen father in over a year. The parents argue that regular *visits* are not required for the beneficial relationship exception, but rather that consistent *contact* (such as by telephone calls), together with some (albeit inconsistent or infrequent) visitation, is sufficient. But they provide no legal authority for this proposition. In any case, father made consistent weekly telephone calls to J.B. only during the final three to four months before the section 366.26 hearing. Previously, father had phoned only occasionally. In sum, the record establishes father’s lack of consistent visitation and contact with J.B.

Father relies on *In re S.B.* (2008) 164 Cal.App.4th 289, but that case does not assist him. There, the parties agreed that the father had “maintained regular, consistent and appropriate visits with [the child] throughout the dependency proceedings.” (*Id.* at p. 298.)

Father also relies on *C.B.*, *supra*, 190 Cal.App.4th 102, where an appellate court remanded the matter to the trial court to reconsider whether the beneficial relationship exception applied as to the mother. (*Id.* at p. 129.) But the specific reason for the remand was that “the juvenile court [had] injected an improper factor into the weighing process, namely, the prospective adoptive parents’ willingness to allow the children to have continued contact with mother.” (*Id.* at p. 128.) *C.B.* does not specify

whether the trial court made any finding as to the mother's regularity of visitation and contact (*id.* at p. 121), nor does it undertake any substantial evidence inquiry as to that prong of the beneficial relationship exception. In any case, the mother in *C.B.* had consistently visited the children twice a week for over half of the dependency period. (*Id.* at p. 111.) Thereafter, the mother's visitation was reduced to once a month in a distant city and the mother missed two of those visits due to transportation problems. (*Id.* at pp. 112-113.)

Father argues his "choice to address his long-term drug use with a restrictive and comprehensive program [that prevented him from visiting J.B.] was done to 'save [father's] life' as after several relapses he was out of options." There is no question that father's decision to address his long-standing substance abuse problem was both necessary and commendable.<sup>4</sup> But one result is that father has not visited J.B. in over a year (and indeed may be unable to regularly visit for another year or two). "Childhood does not wait for the parent to become adequate." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310.) J.B. has already experienced three dependency proceedings in his young life. He should be spared the risk of another dependency proceeding in the future. The court's ruling was correct and supported by substantial evidence.

Because parents failed to meet their burden of proof to show father regularly visited and contacted J.B., we do not address the second prong of the beneficial relationship exception, which requires the court to balance the strength and quality of the

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The social worker wrote in an October 4, 2011 addendum report: "However, the undersigned did not urge the father to enter a substance treatment program so that the father could have the child returned to his care. The undersigned urged the father to enter a program to save his life. The undersigned believes that the father is a long-term substance abuser who is unable to function in society without using drugs and that it will take a long-term substance abuse program, at least a year-long program with a year-long aftercare program as follow up, for this father to begin to learn to change his behavior."

natural parent/child relationship against the security and the sense of belonging provided by an adoptive family. (*Autumn H.*, *supra*, 27 Cal.App.4th 567.)

*The Court Did Not Err by Selecting Adoption, Rather Than Legal Guardianship, as J.B.'s Permanent Plan*

Father argues the court should have selected legal guardianship as J.B.'s permanent plan so as to protect father's parental relationship with the child. At the section 366.26 hearing, father asked the court to consider appointing L.R. as J.B.'s temporary guardian. Father testified that in "a year, two years or whatever," he could be the father that J.B. needs. Father said he loves J.B. and is a good father when sober.

Pursuant to legislative mandate, the clear preference at this stage of the dependency proceedings is for adoption. "After the termination of reunification services, a parent's interest in the care, custody and companionship of the child is no longer paramount." (*In re Stephanie M.* (1993) 7 Cal.4th 295, 317.) Rather, at this point, the focus shifts to the needs of the child for permanency and stability. (*In re Marilyn H.*, *supra*, 5 Cal.4th at p. 309.) "The Legislature has decreed . . . that guardianship is not in the best interests of children who cannot be returned to their parents. These children can be afforded the best possible opportunity to get on with the task of growing up by placing them in the most permanent and secure alternative that can be afforded them." (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1419.) Indeed, under section 366.26, the court *must* select adoption as the permanent plan unless it finds (1) the child is *not* likely to be adopted, (2) the child is living with a relative who is unwilling to adopt the child but is willing to be a legal guardian, *or* (3) a section 366.26, subdivision (c)(1)(B) exception applies. (*Id.* subds. (c)(1), (c)(1)(A), & (c)(1)(B).) The court found J.B. is likely to be adopted and that the only exception at issue in this case (beneficial relationship) did not apply. L.R. is not a relative of J.B. Accordingly, the court was statutorily mandated to select adoption as J.B.'s plan.

Father relies on *In re Brandon C.* (1999) 71 Cal.App.4th 1530, but the case is inapt. There, the appellate court found substantial evidence supported the trial court's finding the mother had maintained regular visitation and that the beneficial relationship exception applied as to her. (*Id.* at p. 1533.) Consequently, the appellate court affirmed the trial court's selection of legal guardianship for the grandmother as the children's permanent plan. (*Id.* at pp. 1532-1533.)

#### *The Court had Sufficient Evidence of J.B.'s Wishes*

Section 366.26, subdivision (h)(1) provides: "At all proceedings under this section, the court shall consider the wishes of the child and shall act in the best interests of the child." Mother contends the court failed to follow the statutory mandate to consider J.B.'s wishes.

At the section 366.26 hearing, the court announced it had considered J.B.'s wishes, consistent with his age as represented by counsel. Neither party objected. The parties have therefore waived the issue. (*In re Amanda D.* (1997) 55 Cal.App.4th 813, 819-820.)

Even if we consider the issue on the merits, mother cannot prevail. "[I]n considering the child's expression of preferences, it is not required that the child specifically understand the proceeding is in the nature of a termination of parental rights." (*In re Leo M.* (1993) 19 Cal.App.4th 1583, 1593.) "To ask . . . children to choose whether they ever see their natural parent again or to give voice to approving that termination" can traumatize youngsters and is not statutorily compelled. (*Ibid.*) Instead, "[w]hat the court must strive to do is 'to explore the minor's feelings regarding his/her biological parents, foster parents, and prospective adoptive parents, if any, as well as his/her current living arrangements. . . .'" (*In re Amanda D., supra*, 55 Cal.App.4th at p. 820.) The "evidence need not be in the form of direct testimony in court or chambers; it can be found in court reports prepared for the hearing." (*Ibid.*) If the record contains no

direct evidence of the child's thoughts on the matter, but includes evidence from which the child's feelings can be inferred, the court may draw such inferences. (*Leo M.*, at pp. 1593-1594.) While a court must consider the child's wishes, it must also act in the child's best interest. (§ 366.26, subd. (h)(1).) A "child's wishes are not necessarily determinative of the child's best interest [citation]." (*C.B.*, *supra*, 190 Cal.App.4th at p. 125.) An appellate court may presume the trial court performed its statutory obligation, if that presumption is supported by sufficient evidence in the record. (*Leo*, at p. 1594.)

Here, the record contains both direct evidence of J.B.'s wishes, as well as indirect evidence from which his wishes can be inferred. When SSA asked J.B. "what his favorite part about living with [L.R.] was, [J.B.] replied 'everything.'" J.B. stated he wants to live in his current home forever. J.B. is "not familiar with the word 'adoption,'" but he and L.R. have discussed "what it means to be a family forever." J.B. thrived in L.R.'s home, was comfortable there, and said he wishes to remain with L.R. He referred to L.R. as his mom. Although he enjoyed visits with his parents, he also said (at one point) that they fought "all the time," that he did not want to visit them until "they think about what they did," and that he acted badly at school for a short period because it hurt him that his parents are not better. After visits with mother, he acted out and required therapy. Once he chose not to return mother's call because he did not "want to be bad." Both father and L.R. believed J.B. did fine with having only telephone calls and no visits with father. In sum, there was sufficient evidence for the court to assess J.B.'s wishes and his best interests.

DISPOSTION

The postjudgment order is affirmed.

IKOLA, J.

WE CONCUR:

ARONSON, ACTING P. J.

THOMPSON, J.